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FRBP 3004  
Late-filed claim by trustee

In re Leslie J. Martin                      698-62706-fra7  
2/12/99                      FRA                      Unpublished

The Trustee had \$5,723 in non-exempt assets, but nobody to pay it to - no creditor having filed a proof of claim. He thereupon filed a notice of surplus assets, but again got no takers. Giving it one last try, he convinced the lone local creditor, a dentist, to file a tardy claim in the amount of \$1,085. Wanting to pay out the remaining funds, the Trustee then filed, more than 30 days past the claims bar date, proofs of claim on behalf of the remaining scheduled creditors - mostly credit card companies. The Debtor filed an objection on the grounds that the proofs of claim filed by the Trustee were untimely filed.

§501(c) allows a debtor or trustee to file a proof of claim on behalf of a nonfiling creditor and FRBP 3004 gives the debtor or trustee 30 days after the claims bar date to make such a filing. Per FRBP 9006(b)(1), the court may grant an extension to file a claim under FRBP 3004 only upon a showing of excusable neglect, when the request is made after the 30 day period. If an extension is granted under that provision, then the filing would be deemed to be timely.

§726 lists the priority of distribution from the debtor's estate. The second level of distribution lists timely-filed claims by the debtor or trustee as well as timely creditor-filed claims. After that, tardy creditor-filed claims may be paid. There is no provision for payment of tardily-filed claims made by the debtor or trustee on behalf of a creditor pursuant to §501(c). Accordingly, a claim filed by a debtor or trustee under §501(c) after the period allowed by FRBP 3004 will not be paid unless the failure to timely file is the result of excusable neglect or an extension of time to file was requested prior to the end of the 30 day period.

As the Trustee failed to file a timely request for extension or to present evidence showing that his failure to file the subject proofs of claim within the period allowed by FRBP 3004 was the result of excusable neglect, the claims were held to be untimely filed and not payable under § 726. The Debtor's objections to claim were sustained.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case No.  
 ) 698-62706-fra7  
LESLIE J. MARTIN, )  
 ) MEMORANDUM OPINION  
Debtor. )

Debtor objects to the proofs of claim filed by the trustee on behalf of certain creditors (i.e. claims 2 - 8, on the ground that the claims were not timely filed. The Trustee argues in response that a claim filed by a trustee should be treated the same as one filed by a creditor and should thus be treated as tardily filed claims which are subordinated in payment to timely-filed unsecured claims. For the reasons that follow, Debtor's objections to claim will be sustained.

Background

\$5,723.10 in non-exempt assets was paid to the Trustee and constitute the only estate funds available for distribution to creditors. An Order and Notice of time to file claims was filed on June 12, 1998, giving creditors 90 days to file claims (i.e to September 10). No creditors filed proofs of claim. A notice of

1 surplus assets was entered on October 2, 1998, which granted  
2 creditors an additional 20 days within which to file a claim.  
3 Again, no creditor filed a claim. After this 20-day period elapsed,  
4 the Trustee called the one local creditor, Dr. Clint Nelson, and  
5 urged him to file a proof of claim. That claim was filed in the  
6 amount of \$1,085. Because there was still additional money in the  
7 estate, the Trustee, on November 23, 1998, filed proofs of claim for  
8 the remaining scheduled creditors.

#### 9 Discussion

10 If a creditor fails to file its proof of claim under 11  
11 U.S.C. § 501(a) within the time allowed, § 501(c) allows the debtor  
12 or the trustee to file proof of such claim. Fed.R.Bankr.P. 3004  
13 allows the debtor or trustee to file such a proof of claim within 30  
14 days after expiration of the bar date. The debtor or trustee may  
15 file a proof of claim under that section after the 30 days, but only  
16 if an extension is sought before the time expires, or the late  
17 filing was the result of excusable neglect. Fed.R.Bankr.P.  
18 9006(b)(1).

19 11 U.S.C. § 726(a) specifies the order of distribution in a  
20 Chapter 7 bankruptcy. The second level of distribution after  
21 priority claims is for:

- 22 a. Timely creditor-filed claims under § 501(a).
- 23 b. Timely-filed claims by a co-debtor under § 501(b) and
- 24 timely-filed claims by a debtor or the trustee under § 501(c).

1 c. Tardily-filed claims which are filed by a creditor under §  
2 501(a) where the creditor had neither notice nor actual knowledge of  
3 the bankruptcy in time to file a timely proof of claim.

4 The third level of distribution is for a tardily-filed proof  
5 of claim filed by a *creditor* under § 501(a). The fourth and fifth  
6 levels of distribution are not relevant in the present case. The  
7 sixth level of distribution is to the debtor.

8 The Trustee argues that the proofs of claim filed by him  
9 should be allowed as tardily-filed creditor claims and paid under §  
10 726(a)(3). He relies on In re Crawford, 135 B.R. 128 (D. Kansas  
11 1991). In that case, the debtor filed a proof of claim for a  
12 creditor more than 30 days after the bar date. The court determined  
13 that the debtor had failed to prove excusable neglect and denied  
14 payment as a timely-filed claim under § 726(a)(2). The court went  
15 on to allow payment of the claim under § 726(a)(3) as a tardily-  
16 filed claim, citing several opinions in support of its position. In  
17 my opinion, the cases cited by the Crawford court do not support its  
18 holding and I decline to follow it.

19 The statute is clear: § 726(a)(3) pertains to "payment of any  
20 allowed unsecured claim proof of which is tardily filed under  
21 section 501(a) . . . ." Had Congress wished to allow payment under  
22 § 726(a)(3) of tardily-filed claims filed by the debtor or trustee<sup>1</sup>,

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23  
24 <sup>1</sup> Technically, it is doubtful that any claim filed under BR 3004 may  
25 be "tardy" for subordination purposes. If the debtor or trustee's failure  
26 to file the proof of claim within the 30 days allowed by BR 3004 is  
determined to be the result of excusable neglect, then the filing is deemed  
to be timely filed per BR 9006(b)(1) ("court may. . . order the period  
(continued...)

1 it would have added § 501(c) to that section. It did not do so. A  
2 proof of claim filed by a debtor or trustee under § 501(c) more than  
3 30 days past the bar date will not, therefore, be paid under § 726  
4 unless the debtor or trustee can prove that the failure to file the  
5 claim within the period allowed by BR 3004 was the result of  
6 excusable neglect.

7 Conclusion

8 The Trustee filed proofs of claim Nos. 2-8 more than 30 days  
9 after the bar date for creditors to file timely proofs of claim. No  
10 extension of time was sought, and the failure to file those claims  
11 within the period allowed by BR 3004 has not been shown to be the  
12 result of excusable neglect. Accordingly, those claims are not  
13 entitled to distribution under § 726. Debtor's objection to those  
14 claims should be sustained.

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17 FRANK R. ALLEY, III  
18 Bankruptcy Judge  
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24 \_\_\_\_\_  
25 (...continued)  
26 enlarged [to act] . . . where the failure to act was the result of  
excusable neglect"]. In other words, a BR 3004 claim will in every case be  
treated as timely or denied outright.